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No. 86-1758

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

BURGESS L. DOAN
Counsel of Record
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506

G. Thomas Battle
Suite 1200 United Center
P.O. Box 273
Charleston, West Virginia 25321
(304) 344-4081

Counsel for Appellant

Of Counsel:

Walker, Chatfield & Doan
1900 Carew Tower
Cincinnati, Ohio 45202

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COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

I WHETHER A CASE OR CONTROVERSY IS PRESENTED.

II WHETHER APPELLANT, AN ASSOCIATION, HAS STANDING TO PRESENT A JUSTICIABLE CASE ON BEHALF OF ITS MEMBERS.

III WHETHER THIS COURT SHOULD CONSIDER APPELLANT'S ARGUMENT OF PREEMPTION.

IV WHETHER THE STATE OF WEST VIRGINIA PROVIDES SUFFICIENT BENEFITS TO APPELLANT'S WATER TRANSPORTATION BUSINESS TO JUSTIFY ITS FUEL USE TAX ON SUCH BUSINESS.

V WHETHER WEST VIRGINIA'S FUEL USE TAX IS A DUTY OF TONNAGE.

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REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

THIS CASE PRESENTS FEDERAL QUESTIONS OF NATIONAL IMPORTANCE WHICH POSITIONS A STATE TAX STATUTE IN CONFLICT WITH A LONG STANDING FEDERAL POLICY OF ESTABLISHING, MAINTAINING, IMPROVING, AND REGULATING A NAVIGABLE INLAND WATERWAY SYSTEM BY IMPOSING A TAX UPON AN INSTRUMENTALITY OF INTERSTATE COMMERCE.

When state statutes bring into focus such conflicts, the burden falls upon the state to demonstrate that such taxation does not place an unreasonable burden upon interstate commerce. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Rather than meet its burden, Appellee would have

this case disposed of on procedural grounds and concludes that the case does not present an issue "worthy of this Court's time." To the contrary, this case presents fundamental questions which must be revisited from time to time to provide guidelines for taxpayers and taxing authorities alike to balance the competing interests of the state and federal governments and to preserve the integrity of the Commerce Clause. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

For the following reasons, this Court should note probable jurisdiction:

A CASE OR CONTROVERSY IS PRESENTED BY AN APPELLANT WITH STANDING TO BE HEARD BASED UPON REAL LIFE EXPERIENCES OF REAL TAXPAYERS

The Appellant's case is based upon the actual experience of real life by real taxpayers. There is nothing hypothetical about filing a tax return and paying taxes pursuant to a state statute which the taxpayer believes to be unconstitutional. The facts have been stipulated by the parties as a part of the State Court proceeding, were recited as a finding of fact in the decision being appealed, and are, therefore, a matter of record before this Court. (J.S. 1 through 27 inclusive, Appendix C). For example, among other things the parties stipulated:

> "Some of Plaintiff's [Appellant's] members are motor carriers within the meaning of West Virginia Code Section 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, ..." (Brackets added).
>
> "The State Tax Commissioner requires the tax imposed by West Virginia Code Section 11-15A-13(a) to be paid with respect to all gasoline and special fuel used and consumed by barge transportation operating in West Virginia waters." (J.S. 21).
>
> "Certain of Plaintiff's [Appellant's] members operating in West Virginia have filed returns required under the

provisions of House Bill 1657 and paid tax on fuel purchased outside West Virginia and used in their river transportation business in West Virginia. . . ." (Brackets added).

"As a result of House Bill 1657 codified as West Virginia Code Section 11-15A-13(a)(2), the state collects from watercraft . . . approximately one million dollars per year. . . ." (J.S. 27).

AN APPEAL FROM A STATE COURT DECLARATORY JUDGMENT PRESENTS A CASE OR CONTROVERSY WHERE THERE IS AN ACTUAL AND ACUTE CONTROVERSY

This action was commenced and prosecuted within the state courts of West Virginia pursuant to the Uniform Declaratory Judgment Act, *Chapter 55, Article 13, Section 1 etc. of the Code of West Virginia.* For purposes of establishing a "case or controversy" within the meaning of Article III of the Constitution, this Court has made it clear on more than one occasion that the constitutionality of a statute may be challenged by way of a complaint for declaratory judgment by showing: that the Suitor is affected prejudicially by the application or enforcement of the statute, *State of Texas* v. *Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1922); and that its sanctions have been set in motion against the Suitor. *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954).

The statute imposes on Appellant's members a tax on fuel consumed while navigating the inland waterways in connection with transporting cargo in interstate commerce. The use tax (which is in addition to the federal use tax on the same activity) is clearly prejudicial to Appellant. Moreover, its sanctions have been placed in motion in that the Tax Commissioner of West Virginia has been charged with the duty to enforce the statute. (J.S. 25). The parties have jointly stipulated the statute at issue, (J.S. 3) that Appellant's members are af-

fected prejudically by the application or enforcement of the statute (J.S. 21) and that its sanctions have been set in motion against Appellant's members. (J.S. 24).

AN ASSOCIATION WHOSE MEMBERS OR MEMBER IS SUFFERING AN IMMEDIATE OR THREATENED INJURY AS A RESULT OF THE CHALLENGED ACTION HAS STANDING IF THE MEMBER WOULD HAVE HAD STANDING TO MAKE OUT A JUSTICIABLE CASE

The Appellee next argues that the Appellant has no standing to assert the rights of non-parties to this proceeding.

The parties stipulated and the court below found that:

> "Certain of Plaintiff's [Appellant's] members operating in West Virginia have filed returns and paid tax on fuel purchased outside of West Virginia and used in . . . West Virginia . . . ."(J.S. 24). (Brackets supplied).

The Appellant alleged in its Complaint that the statute imposing the tax is unconstitutional. The Association, acting as a conduit for the benefit of its members placed the constitutionality of the statute at issue just as the individual member or members would have done on an individual basis.

In *Warth* v. *Seldin*, 422 U.S. 490 (1975), this Court addressed the issue of standing of an association to maintain a suit on behalf of its members where it stated:

> "Even in the absence of injury to itself an association may have standing solely as the representative of its members, . . . the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." 422 U.S., at 511.

This Court held in that case that the association did not have standing because the injury to its members was not shown in sufficient immediacy to warrant judicial intervention. In this case, however, the parties have stipulated that the members of the association have paid taxes pursuant to the plain requirements of a statute which they have alleged to be unconstitutional. Certainly the individual member of the association who has complied with the statute by filing its return and paying the tax would have standing to present a justiciable case. Moreover, the threshold relief sought is to have the statute declared unconstitutional and thus the individual participation of each injured party is not indispensable to the proper resolution of the cause. The case may be remanded to the State Court to address the matter of refunds or other relief as this Court has done in prior cases. *American Trucking Association, Inc., et al., Appellants* v. *James I. Scheiner, Secretary, Department of Revenue, et al.*, No. 86-357 Decided June 23, 1987 ____ U.S. ____, (1987). *Boston Stock Exchange* v. *State Tax Commissioner*, 429 U.S. 318 (1977); *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

The Appellant has prayed for relief from the statute in question by requesting the Court to determine that:

> "The tax imposed by House Bill 1657 is unconstitutional and without effect and that the Court enter an order declaring the said tax to be invalid and unenforceable against Appellant's members and all others similarly affected . . . ." (Count I Complaint).

This Court has held that while the ordinary course of judicial procedure results in a judgment requiring the award of process or execution to carry it into effect, such relief is *not* an indispensable adjunct to the exercise of the judicial function. *Nashville, C & SLR Co.* v. *Wallace*, 288 U.S. 249, 77 L Ed. 730 (1933). Accordingly, this Court is free to decide the underlying federal question as to the constitutionality of the statute and remand the case to the State Courts for further proceedings as to specific relief regarding actual refunds of taxes.

THIS COURT MAY CONSIDER APPELLANT'S PREEMPTION ARGUMENT SINCE THE CONCEPT OF PREEMPTION IS INHERENT WITHIN THE COMMERCE CLAUSE

The Appellee next argues that Appellant is precluded from raising the issue or preemption as this issue was not raised in the State Court proceeding. The Appellee again ignores the allegations in the Complaint and joint stipulation of the parties.

> "The United States Government has sole responsibility for regulation, servicing, and maintenance of the navigable waterways of which the Ohio, Kanawha, Big Sandy, and Monongahelia Rivers are a part. Article 1, Section 8, and Article 3, Section 2, Constitution of the United States, Title 33 U.S.C. Section 1; Title 49 U.S.C. Section et seq." (J.S. 18).

The court below accepted the joint stipulation and, therefore, considered these facts in connection with rendering its decision.

Although the term "preemption" was not used in the joint stipulation, the term "sole responsibility" would encompass the term "preemption." According to Webster, to "preempt" is to act to the exclusion of others while to have "sole responsibility" is to have exclusive responsibility. It is axiomatic that if government has sole responsibility, it also has the corresponding sole authority to discharge that responsibility. The concept of "preemption" is inherent within the agreed Stipulation as to the Commerce Clause argument and Appellee cannot at this late date disavow that admission.

In connection with carrying out its function of regulating and maintaining the navigable waterways, a federal tax has been imposed on fuel used by the same watercraft pursuant to Section 26 U.S.C. 4042 of the Internal Revenue Code. This should not be viewed as a new argument but is simply a dimension of the Commerce Clause argument.

Whether this Court would view the joint stipulation by the parties as having raised the preemption issue; whether this

Court would take judicial notice of the Federal tax statute, or whether it would choose to disregard the argument, it is still inescapable that the United States Government has sole power of taxation of interstate commerce in the absence of the state showing that such tax is within the parimeters permitted by this court. The state has not met its burden and would enlist the aid of this Court to avoid the task.

> "For a hundred years it has been accepted consitutional doctrine that the Commerce Clause, without the aid of Congressional Legislation thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the State Legislature is under the Commerce Clause, the final arbitration of the competing demands of state and national interests." 325 U.S. at 769. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

THE STATE OF WEST VIRGINIA PROVIDES NO BENEFITS TO APPELLANT'S WATER TRANSPORTATION BUSINESS

Section 11-15A-13(g) provides:

> "All tax collected under the provisions of this section . . . shall be deposited in the "road fund" . . . and shall be used only for the purpose of construction, reconstruction, maintanance, and repair of highways . . . ."

The parties have jointly stipulated that the sole responsibility for maintaining and regulating the waterways is assumed by the federal government. The fact that the watercraft pass through the state does not demonstate the kind of nexus that justifies a tax on interstate commerce. Actually, it is just the opposite. The very purpose of the Federal Government retaining control over inland navigable waterways is to insure that they remain open to promote the free flow of commerce without undue burdens of state taxation. As this Court pointed out in *McCulloch* v. *Maryland*, 4 Wheat 316 (1819) p. 326 "The power to tax is the power to destroy." The exer-

cise of such power by a state over an indispensable link in a chain of navigable waterways can indeed break the chain. If plying a navigable waterway while passing through a state is the only requirement to trigger a state use tax on fuel consumed, the next logical step is for the state to establish a toll booth on the rivers. This tax cannot meet the test set forth in *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), as the state statutes demonstrate that no other benefits are provided by the state to the water transportation passing through the state.

The burden is upon the state to demonstrate that revenue raised by the tax benefits the activity subjected to the tax. *Massachusetts* v. *United States*, 435 U.S. 444 (1978); *Complete Auto Transit, Inc. vs. Brady*, 430 U.S. 274 (1977).

The Appellant has demonstrated that: (1) the state has imposed a tax upon an instrumentality of interstate commerce which depends exclusively upon the inland waterways as its mode of transportation; (2) that the revenues raised are used for building highways within the state; and (3) that the federal government has the sole responsibility for maintaining, servicing, and regulating the inland waterways.

A PROHIBITED DUTY OF TONNAGE IS DETERMINED BY ITS EFFECT ON INTERSTATE COMMERCE

Appellee's argument on the duty of Tonnage issue is summarized by the assertion that the West Virginia fuel use tax "is simply not a 'duty of tonnage' in the constitutional sense of that term." (Appellee's Motion at 26). Further, Appellee asserts that the authorities relied on by Appellant are applicable only when a toll or charge is made for a specific government facility.

A recent description of the object of the Duty of Tonnage restriction appears in *Massachusetts* v. *United States*, supra wherein the Court stated that:

> ". . . the prohibition against duties on the privilege of entering ports is intended specifically to guard against local hindrances to trade and commerce by vessels. See

Packet Co. v. *Keokuk*, 95 U.S. 80, 85, 24 L.Ed. 377 (1877)."

While the case involved the issue of state immunity from a tax imposed by the Federal Government, the Court nonetheless reviewed the line of decisions interpreting the constitutional provisions which place limitations on the taxing power of government.

The cases that prohibit state levies "for the privilege of entering, trading in or lying in a port," regardless of the name or form such levies may take, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935), carefully distinguish charges to reinburse the costs of improvements. *Clyde Mallory*, supra, at 266; *Keokuk Northern Line Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877). The United States Supreme Court has stated that "(f)or outlays caused by such works the State may exact reasonable tolls." *Huse* v. *Glover*, 119 U.S. 543, 548 (1886). The State of West Virginia has provided no such "works" which entitle it to place a charge upon vessels for navigating the public waters.

The incidence of the tax challenged by Appellant is the consumption of the fuel, an indispensable necessity of river transportation. It burdens the voyage itself, the very center and irreducible minimum of the navigation process. The vessel starts burning fuel "at waters edge" and does so all the way to its destination. The economic burden of the state's exaction falls on the cargo, each item bearing a share proportioned in part to the distance of its transportation. The tax is clearly a levy on river transportation of cargo moved by barge, and thus a local hindrance to trade and commerce by vessels that the Duty of Tonnage prohibition is intended to guard against.

The focus of the United States Supreme Court in reviewing the limitations of the states to exercise their taxing power is on the practical effect of the challenged tax. *Commonwealth Edision Co.* v. *Montana*, 453 U.S. 609, 625 (1981). The practical effect of the tax on fuel consumed in vessels engaged in interstate river transportation is to unduly burden that

navigation and require payment for entering West Virginia waterways. This effect is prohibited by the Constitution.

CONCLUSION

Appellant has shown that there are no procedural barriers to the Court's acceptance of this case and that substantive Constitutional issues are presented. Therefore, the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

BURGESS L. DOAN
Counsel for Appellant
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506

G. Thomas Battle
Suite 1200 United Center
P.O. Box 273
Charleston, West Virginia 25321
(304) 344-4081